12/6

DISTRIBUTED

No. 73-7006

RECEIVED
DEC 23 1974
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL COPY

OCTOBER TERM, 1974

JAMES P. LEE, JR. and RONALD RICH, APPELLANTS

v.

WILLIAM THORNTON, DISTRICT DIRECTOR OF THE UNITED STATES CUSTOMS FOR THE DISTRICT OF VERMONT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

MOTION TO VACATE OR AFFIRM

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-7006

JAMES P. LEE, JR. and RONALD RICH, APPELLANTS

v.

WILLIAM THORNTON, DISTRICT DIRECTOR OF THE UNITED STATES CUSTOMS FOR THE DISTRICT OF VERMONT, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

MOTION TO VACATE OR AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellees move that the judgment of the district court be vacated or, alternatively, that it be affirmed.

STATEMENT[1/]

1. On October 27, 1971, a border patrol agent saw appellant Rich, his wife, and their two minor children drive across the border from Canada into the United States at Alburg, Vermont, without passing through a Customs station. The agent stopped Rich's automobile in the vicinity of Swanton, Vermont. The agent accused Rich of having crossed the border illegally and directed him to proceed to the border station at Highgate,

---

1/ The facts were stipulated.

Vermont. Customs agents there searched the automobile, advised Rich that he was charged under 19 U.S.C. 1459 with failure to stop at a border checkpoint, told him that a statutory penalty of $100 for him and $500 for each of his three passengers could be assessed against him under 19 U.S.C. 1460, and said they were going to hold the car for payment of the penalty. 2/

Customs officials informed Rich that he could file an immediate petition for remission and mitigation of penalties, pursuant to 19 U.S.C. 1618. Rich filed such a petition at that time and a customs inspector told him that the automobile would be released upon payment of a cash deposit of $50 "toward the ultimate mitigated penalty." Rich paid the deposit and Customs released the automobile.

On January 6, 1972, Rich received a "Notice of Penalty Incurred and Demand for Payment" (Customs Form 5995A) which, among other things, advised him of his rights and the procedures required to request administrative relief (Stip. Ex. B). On January 14, 1972, appellee Thornton, District Director of the Bureau of Customs, notified Rich by letter that the penalty had been mitigated to $25 and that this penalty would be deducted from his $50 deposit, the balance of which

---

2/ 19 U.S.C. 1594 provides that whenever a driver or owner of a vehicle becomes subject to a penalty for violation of the customs-revenue laws of the United States, the vehicle involved shall be held for payment of such penalty and may be proceeded against summarily by libel to recover the penalty.

would be returned to Rich.[3] Rich filed no supplemental petition.[4]

2. On October 4, 1971, a border patrol agent saw appellant Lee's van crossing into the United States from Canada at Alburg Springs, Vermont, although the Customs station there was closed. The agent followed the van, driven at that time by an acquaintance of Lee, to East Alburg, Vermont, where the agent stopped it. Lee told the agent that he had not gone to the Immigration and Custom station at Alburg, as directed by the signs at Alburg Springs, because he thought that his vehicle had insufficient fuel to reach it. The agent ordered Lee to drive the van and his passengers to Immigration headquarters in Swanton, Vermont.

After Customs agents in Swanton searched the van, they told Lee that they had found several items of foreign manufacture with no proof of domestic purchase, plus two clip scales and one gram of marijuana seeds; that Lee and the others were free to leave; but that Customs had seized the van and personal property.

The next day Lee asked appellee Thornton about release of the van, and Thornton told him that he would be required to deposit $1,800 in cash to obtain its release. See 19 U.S.C. 1614. On October 19, 1971, Thornton advised Lee that he was charged with failure to stop at the nearest border check-point, in violation of 19 U.S.C. 1459, illegal importation of goods, in

OVERSIZE PAGE
SEE NEXT FRAME
FOR REMAINDER OF PAGE

[3] Though it is not reflected in the record, the government soon

was closed. The agent followed the van, driven at that time by an acquaintance of Lee, to East Alburg, Vermont, where the agent stopped it. Lee told the agent that he had not gone to the Immigration and Customs station at Alburg, as directed by the signs at Alburg Springs, because he thought that his vehicle had insufficient fuel to reach it. The agent ordered Lee to drive the van and his passengers to Immigration headquarters in Swanton, Vermont.

After Customs agents in Swanton searched the van, they told Lee that they had found several items of foreign manufacture with no proof of domestic purchase, plus two clip scales and one gram of marijuana seeds; that Lee and the others were free to leave; but that Customs had seized the van and personal property.

The next day Lee asked appellee Thornton about release of the van, and Thornton told him that he would be required to deposit $1,800 in cash to obtain its release. See 19 U.S.C. 1614. On October 19, 1971, Thornton advised Lee that he was charged with failure to stop at the nearest border check-point, in violation of 19 U.S.C. 1459, illegal importation of goods, in

---

3/ Though it is not reflected in the record, the government soon sent Rich a check for $25.

4/ The regulations provide that a person not satisfied with the decision on his petition may file a supplemental petition. 19 C.F.R. 171.33.

violation of 19 U.S.C. 1595a, and illegal importation of controlled substances, in violation of 21 U.S.C. 881; that a statutory penalty of $1,845 had been assessed; and that the van and personal property therein were subject to forfeiture.

Thornton also advised Lee of his right to file a petition for mitigation and remission under 19 U.S.C. 1618. On October 27, 1971, Lee filed such a petition, in which he set forth his version of the events of October 4. On November 1, 1971, Thornton notified Lee by letter that the penalty had been remitted in full and that the forfeiture of the van had been mitigated to $100 "in view of the fact that the vehicle was found being used to transport marijuana." Lee filed no supplemental petition, but he paid the $100 and regained possession of the van.

3. Under 16 U.S.C. 1608, the government is obliged to institute judicial forfeiture proceedings for property valued at less than $2500 if a claimant files a claim and $250 bond to cover court costs. Neither appellant filed such a claim and cost bond. Instead, both appellants filed suits in the United States District Court for the District of Vermont against the District Director of Customs, the Commissioner of Customs, the Secretary of the Treasury and, by subsequent amendment, the United States. The complaints sought (1) declaratory judgments that various provisions of the customs laws are unconstitutional, (2) injunctions against the enforcement of those provisions, (3) mandamus relief requiring the return of moneys paid ($25 and $100, respective-

OVERSIZE PAGE
SEE NEXT FRAME
FOR REMAINDER OF PAGE

van and personal property therein were subject to forfeiture.

Thornton also advised Lee of his right to file a petition for mitigation and remission under 19 U.S.C. 1618. On October 27, 1971, Lee filed such a petition, in which he set forth his version of the events of October 4. On November 1, 1971, Thornton notified Lee by letter that the penalty had been remitted in full and that the forfeiture of the van had been mitigated to $100 "in view of the fact that the vehicle was found being used to transport marijuana." Lee filed no supplemental petition, but he paid the $100 and regained possession of the van.

3. Under 16 U.S.C. 1608, the government is obliged to institute judicial forfeiture proceedings for property valued at less than $2500 if a claimant files a claim and $250 bond to cover court costs. Neither appellant filed such a claim and cost bond. Instead, both appellants filed suits in the United States District Court for the District of Vermont against the District Director of Customs, the Commissioner of Customs, the Secretary of the Treasury and, by subsequent amendment, the United States. The complaints sought (1) declaratory judgments that various provisions of the customs laws are unconstitutional, (2) injunctions against the enforcement of those provisions, (3) mandamus relief requiring the return of moneys paid ($25 and $100, respectively) as mitigated forfeitures or penalties based on violation of

the customs laws, and (4) damages of $2000 each. The cases were consolidated, and a three-judge district court was convened pursuant to 28 U.S.C. 2282.

The court held that it had jurisdiction under the Tucker Act (28 U.S.C. 1346(a)(2)), rejected appellants' constitutional claims, directed appellees to apply the customs laws only in accordance with the construction given them by the court,[5] declined to remit appellants' fines, and returned to the single-judge district court the question of damages (J.S. App. A).

ARGUMENT

1. The sole basis upon which the district court assumed jurisdiction in this case was the Tucker Act, 28 U.S.C. 1346(a)(2), which, insofar as here pertinent, gives the district courts jurisdiction over "[a]ny * * * civil action or claim against the United States * * * founded either upon the Constitution or any Act of Congress * * *." This provision did not give the district court jurisdiction over appellants' claim to enjoin enforcement of the provisions of the customs laws that they challenge as unconstitutional.[6]

5/ The court construed 19 U.S.C. 1460 as not permitting seizure or forfeiture for violation of 19 U.S.C. 1459 based on mere failure to report to a customs station; construed 19 U.S.C. 1594 as requiring a preliminary hearing to determine whether there was a violation of Section 1459 and to assess a preliminary penalty under Section 1460; and construed 19 U.S.C. 1595a and 21 U.S.C. 881(a)(4) as requiring a preliminary hearing to determine whether a violation justifying forfeiture had occurred.

6/ Although the government challenged the district court's jurisdiction, we did not appeal. But this Court must notice jurisdictional errors, even sua sponte if they have not been raised

OVERSIZE PAGE
SEE NEXT FRAME
FOR REMAINDER OF PAGE

accordance with the construction given them by the court,[5] declined to remit appellants' fines, and returned to the single-judge district court the question of damages (J.S. App. A).

ARGUMENT

1. The sole basis upon which the district court assumed jurisdiction in this case was the Tucker Act, 28 U.S.C. 1346(a)(2), which, insofar as here pertinent, gives the district courts jurisdiction over "[a]ny * * * civil action or claim against the United States * * * founded either upon the Constitution or any Act of Congress * * *." This provision did not give the district court jurisdiction over appellants' claim to enjoin enforcement of the provisions of the customs laws that they challenge as unconstitutional.[6]

5/ The court construed 19 U.S.C. 1460 as not permitting seizure or forfeiture for violation of 19 U.S.C. 1459 based on mere failure to report to a customs station; construed 19 U.S.C. 1594 as requiring a preliminary hearing to determine whether there was a violation of Section 1459 and to assess a preliminary penalty under Section 1460; and construed 19 U.S.C. 1595a and 21 U.S.C. 881(a)(4) as requiring a preliminary hearing to determine whether a violation justifying forfeiture had occurred.

6/ Although the government challenged the district court's jurisdiction, we did not appeal. But this Court must notice jurisdictional errors, even sua sponte if they have not been raised by the parties. See, e.g., Edelman v. Jordan, 415 U.S. 651, 677-678; Gutierrez v. Waterman S.S. Corp., 373 U.S. 206, 209; McGrath v. Kristensen, 340 U.S. 162, 167; Rochester Tel. Corp. v. United States, 307 U.S. 125, 128, n.3; United States v. Corrick, 298 U.S. 435, 440. A claim of lack of subject matter jurisdiction "may be considered, and appropriate judgment given, at any stage of the proceedings, either here or below." Matson Nav. Co. v. United States, 284 U.S. 352, 359.

The Tucker Act empowers the district court only to award damages, but not to grant injunctive or declaratory relief. Richardson v. Morris, 409 U.S. 464; United States v. King, 395 U.S. 1; United States v. Sherwood, 312 U.S. 584, 589-591.[7] Since the statute would not authorize the district court to enjoin the enforcement of the customs laws, it follows that (1) the three-judge court was improperly convened[8] and (2) this Court has no jurisdiction to hear the appeal from that court's refusal to grant injunctive relief based on appellants' constitutional claims. See Moody v. Flowers, 387 U.S. 97, 104.[9]

7/ The declaratory and injunctive relief granted here was not merely incidental or ancillary to vindication of appellants' claims for damages, on which the court has not acted. See Clay v. United States, 210 F.2d 686 (C.A.D.C.), certiorari denied, 347 U.S. 927; cf. 28 U.S.C. (Supp. II) 1491.

8/ The three-judge court statute (28 U.S.C. 2282) provides only a mode of procedure and is not a grant of jurisdiction. Accordingly, if the complaint states no jurisdictional basis for injunctive relief (even if an action for damages might lie under the Tucker Act), there would be no grounds for convening a three-judge district court. See Lewis v. Texas Power & Light Co., 462 F. 2d 1318, 1320 (C.A. 5); Non-resident Taxpayers Ass'n v. Municipality of Philadelphia, 341 F. Supp. 1135 (D. N.J.), affirmed, 406 U.S. 951; cf. Alexander v. v. Americans United, Inc., 416 U.S. 752, 758.

9/ There is an additional reason to question whether the three-judge court was properly convened. Because the injunction and declaratory relief granted by the three-judge court rested upon a non-constitutional ground, i.e., construction of the statutes in issue, that relief, if otherwise appropriate, could and should have been granted by a single judge. See Hagans v. Lavine, 415 U.S. 528, 543-545. While the court's construction of the statutes did not wholly obviate the need to consider appellants' constitutional claims, the constitutional issues remaining (i.e., those pressed in this Court) are not substantial, as we show below (see pp. 6-8, infra), and so would themselves not have required that a three-judge court then be convened. Cf. Hagans v. Lavine, supra, 415 U.S. at 536-539. A three-judge court was not required here by

OVERSIZE PAGE
SEE NEXT FRAME
FOR REMAINDER OF PAGE

U.S. 1; United States v. Sherwood, 312 U.S. 584, 589-591.

Since the statute would not authorize the district court to enjoin the enforcement of the customs laws, it follows that (1) the three-judge court was improperly convened [8] and (2) this Court has no jurisdiction to hear the appeal from that court's refusal to grant injunctive relief based on appellants' constitutional claims. [9] See Moody v. Flowers, 387 U.S. 97, 104.

7/ The declaratory and injunctive relief granted here was not merely incidental or ancillary to vindication of appellants' claims for damages, on which the court has not acted. See Clay v. United States, 210 F.2d 686 (C.A.D.C.), certiorari denied, 347 U.S. 927; cf. 28 U.S.C. (Supp. II) 1491.

8/ The three-judge court statute (28 U.S.C. 2282) provides only a mode of procedure and is not a grant of jurisdiction. Accordingly, if the complaint states no jurisdictional basis for injunctive relief (even if an action for damages might lie under the Tucker Act), there would be no grounds for convening a three-judge district court. See Lewis v. Texas Power & Light Co., 462 F. 2d 1318, 1320 (C.A. 5); Non-resident Taxpayers Ass'n v. Municipality of Philadelphia, 341 F. Supp. 1135 (D. N.J.), affirmed, 406 U.S. 951; cf. Alexander v. v. Americans United, Inc., 416 U.S. 752, 758.

9/ There is an additional reason to question whether the three-judge court was properly convened. Because the injunction and declaratory relief granted by the three-judge court rested upon a non-constitutional ground, i.e., construction of the statutes in issue, that relief, if otherwise appropriate, could and should have been granted by a single judge. See Hagans v. Lavine, 415 U.S. 528, 543-545. While the court's construction of the statutes did not wholly obviate the need to consider appellants' constitutional claims, the constitutional issues remaining (i.e., those pressed in this Court) are not substantial, as we show below (see pp. 6-8, infra), and so would themselves not have required that a three-judge court then be convened. Cf. Hagans v. Lavine, supra, 415 U.S. at 536-539. A three-judge court was not required here by the underlying policy of the three-judge court statutes, which is "to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal judge." Gonzalez v. Automatic Employees Union, No. 73-858, decided December 10, 1974, slip op. p. 8 (emphasis supplied).

Although the government believes that none of the other bases upon which the appellants invoked the jurisdiction of the district court was sufficient to authorize the court to grant injunctive relief, the district court did not pass upon them. Accordingly, it would be appropriate for this Court to vacate the judgment of the district court and to remand the case to that court to consider the other statutory provisions which appellants relied on as conferring jurisdiction over this action. Cf. Richardson v. Morris, supra.

2. Appellants' constitutional contentions are insubstantial so that, if the Court reaches them, there is no occasion to give them plenary consideration.

(a) Appellants have not been denied the opportunity for a hearing to determine whether penalties were properly imposed against them under 19 U.S.C. 1460. Appellants elected to follow the statutory procedure of making a deposit toward the penalties and then seeking their remission and mitigation, as a result of which all but $25 of Rich's penalty and all of Lee's penalty was remitted.[10/] Appellants could have compelled the government to institute a forfeiture proceeding pursuant to 19 U.S.C. 1594, 1595a, 1604 and 1607-1609, at which the government would have been required to establish the basis for the penalties. To invoke that procedure, however, appellants would have been required by 19 U.S.C. 1608 to file a claim and post a $250 bond. Having decided to follow the simpler and cheaper procedure of seeking administrative remission and mitigation of penalties,

OVERSIZE PAGE
SEE NEXT FRAME
FOR REMAINDER OF PAGE

to that court to consider the other statutory provisions which appellants relied on as conferring jurisdiction over this action. Cf. Richardson v. Morris, supra.

2. Appellants' constitutional contentions are insubstantial so that, if the Court reaches them, there is no occasion to give them plenary consideration.

(a) Appellants have not been denied the opportunity for a hearing to determine whether penalties were properly imposed against them under 19 U.S.C. 1460. Appellants elected to follow the statutory procedure of making a deposit toward the penalties and then seeking their remission and mitigation, as a result of which all but $25 of Rich's penalty and all of Lee's penalty was remitted.[10/] Appellants could have compelled the government to institute a forfeiture proceeding pursuant to 19 U.S.C. 1594, 1595a, 1604 and 1607-1609, at which the government would have been required to establish the basis for the penalties. To invoke that procedure, however, appellants would have been required by 19 U.S.C. 1608 to file a claim and post a $250 bond. Having decided to follow the simpler and cheaper procedure of seeking administrative remission and mitigation of penalties, appellants cannot properly now complain because there was no

---

10/ In view of this fact, Lee lacks standing to challenge the procedure under which the penalties are imposed, and any issue with respect to the penalty against him is moot.

formal hearing before a small portion of one of the penalties was not remitted.

Appellant Lee challenges the requirement that a $250 bond must be posted before the government can be required to institute forfeiture proceeding. As Judge Learned Hand held over 30 years ago in Colacicco v. United States, 143 F. 2d 410, 411-412 (C.A. 2), certiorari denied, 323 U.S. 762, however, Section 1608 is "clearly constitutional" and has been repeatedly sustained.[11] Cf. United States v. Kras, 409 U.S. 434. Moreover, in Colacicco the court was unwilling to consider a claim that the bond requirement impaired the ability of an indigent to challenge a forfeiture, where the claimant had not shown that he was unable to obtain leave to proceed in forma pauperis. See 28 U.S.C. 1915. No such showing has been made here.

(b) Appellants argue that the hearing provided under the forfeiture provisions of the customs law is inadequate. Their challenge to 19 U.S.C. 1615--which since 1890 (26 Stat. 140) has provided that a claimant of property in a forfeiture proceeding has the burden of proof once the government shows probable cause for the institution of the action--rests upon the misconception that forfeiture proceedings are "quasi-criminal" in nature (J.S. 13-14). But this Court held in One Lot Emerald Cut Stones v. United States, 409 U.S. 232, that the forfeiture provisions involved here are not subject to all the requirements of criminal proceedings. Moreover, in Calero-Toledo v. Pearson Yacht Leasing

OVERSIZE PAGE
SEE NEXT FRAME
FOR REMAINDER OF PAGE

ago in Colacicco v. United States, 143 F. 2d 410, 411-412 (C.A. 2), certiorari denied, 323 U.S. 762, however, Section 1608 is "clearly constitutional" and has been repeatedly sustained. [11] Cf. United States v. Kras, 409 U.S. 434. Moreover, in Colacicco the court was unwilling to consider a claim that the bond requirement impaired the ability of an indigent to challenge a forfeiture, where the claimant had not shown that he was unable to obtain leave to proceed in forma pauperis. See 28 U.S.C. 1915. No such showing has been made here.

(b) Appellants argue that the hearing provided under the forfeiture provisions of the customs law is inadequate. Their challenge to 19 U.S.C. 1615--which since 1890 (26 Stat. 140) has provided that a claimant of property in a forfeiture proceeding has the burden of proof once the government shows probable cause for the institution of the action--rests upon the misconception that forfeiture proceedings are "quasi-criminal" in nature (J.S. 13-14). But this Court held in One Lot Emerald Cut Stones v. United States, 409 U.S. 232, that the forfeiture provisions involved here are not subject to all the requirements of criminal proceedings. Moreover, in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, the Court recognized that it would be consistent

---

11/ The requirement of a $250 cost bond dates from at least 1844, at which time it was required if the value of the goods were less than $100. 5 Stat. 653.

with due process to impose upon the claimant of property subject to forfeiture the burden of proving grounds that might bar the forfeiture.[12] Id. at 689-690.

CONCLUSION

The judgment of the district court should be vacated and remanded for consideration of other asserted bases of jurisdiction. Alternatively, the judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

12/ A similar challenge to the burden of proof provisions of the forfeiture laws was rejected in Bramble v. Richardson, 498 F. 2d 968 (C.A. 1), certiorari denied, No. 74-280, December 16, 1974.